IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 249

WYATT TEE WALKER, *et al.*,

Petitioners,

— v. —

CITY OF BIRMINGHAM.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITION FOR REHEARING

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Introduction

Petitioners pray that this Court grant rehearing of its decision of June 12, 1967, affirming petitioners' convictions of criminal contempt. Petitioners earnestly submit that the opinion of the Court rests upon assumptions concerning Alabama law and practice which were not the subject of presentation to the Court and which are incorrect. Moreover, the Court's decision was apparently influenced by a misunderstanding of petitioners' fundamental claims. Finally, petitioners submit that the unfortunate consequences of this Court's decision have not been adequately explored.

Reasons for Granting Rehearing

I.

The majority opinion in effect creates two categories of governmental restraints trenching upon First Amendment rights: (1) statutes, ordinances, or executive orders, which may be ignored; and (2) judicial determinations which must be obeyed until vacated. Setting aside the question whether such a bifurcated analysis is rationally supportable, it is evident that the majority uncritically accepted Alabama's assertion that the process issued by the State circuit court merited the respect due litigated judicial determinations. In this it erred. The temporary restraining order in this case was obtained without notice or hearing, on papers containing no allegation that such notice and hearing were impossible and, indeed, *where such notice and hearing could easily have been afforded.* Whatever effect this Court decides should be given to litigated court orders forbidding speech, we pray that it reconsider whether the same consequences should flow from *ex parte* orders, where notice and hearing are possible.

The *ex parte* restraining order issued in this case should not have been placed in the same category as litigated injunctions, even assuming that the latter are rationally distinguishable from statutes which, if patently unconstitutional, can be ignored. The majority assumed that there is no distinction between litigated injunctions and the restraining order here, but there is little support for this assumption. In fact, the rationale of the majority opinion itself suggests that this assumption is mistaken, for the only reason for treating an injunction differently from a statute is that, given normal judicial procedures, the rights

of the parties subject to the injunction will have come under the scrutiny of a court prior to the issuance of the injunction. Both sides will have had their day in court. There is no generic difference between efforts to dissolve an *ex parte* temporary restraining order and defenses against enforcement of a permit ordinance. There is no reason to believe that one is more expeditious or different in form or content than the other. Given this rationale, there is no reason to place *ex parte* restraining orders in the same category as litigated injunctions.

The Due Process clause requires, at a minimum, "that deprivation of life, liberty, or property by adjudication be proceeded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313. Thus, in *Walker* v. *City of Hutchinson*, 352 U. S. 112, notice by publication to a resident landowner was rejected. And see, *Schroeder* v. *City of New York*, 371 U. S. 208. The *ex parte* hearing smacks of Star Chamber proceedings without counsel. See *In re Oliver*, 333 U. S. 257.

Rule 65 of the Federal Rules of Civil Procedure, in contrast, provides the strictest possible safeguards against the issuance of restraining orders without notice and opportunity for hearing. In recommending amendment of the rule in 1966 to tighten the safeguards, the Advisory Committee stated:

> In view of the possibly drastic consequences of a temporary restraining order, the opposition should be heard, if feasible, before the order is granted.

(Moore's Federal Practice Rules Pamphlet, 1966, p. 1109.) New Rule 65, further tightening earlier safeguards, re-

quires submission of an affidavit setting out all attempts to give notice with the motion for a temporary restraining order, in addition to proof of immediate and irreparable injury.

Petitioners submit that the principle underlying Rule 65 of the Federal Rules of Civil Procedure is of constitutional dimensions; failure to give notice and hearing "offends our customary notions of fair play."[1]

It is a matter of common knowledge among attorneys of experience that almost no court will issue a restraining order without notice to the adverse party and hearing, unless the unfeasibility of giving such notice is demonstrated. Yet the City of Birmingham did not allege in its papers requesting the order, nor did the Alabama court find, that notice could not be given to the petitioners. In fact, notice could easily have been given; the petitioners were served copies of the order shortly after it was issued.

The implications for First Amendment freedoms of elevating the *ex parte* temporary restraining order issued in this case to the level of a litigated injunction—and distinguishing it from equally lawless statutes—have not been presented to, or considered by, the Court. For that reason alone rehearing is appropriate.

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[1] *Arvida Corp.* v. *Sugarman*, 259 F. 2d 428, 429 (2nd Cir. 1958) (Lumbard, *J.* concurring).

II.

The linchpin of the majority opinion is the assumption that petitioners, by filing a motion to dissolve the injunction in the state circuit court on April 11, 1963, could have received prompt and impartial determination of their First Amendment claims:

> This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims. But there is no showing that such would have been the fate of a timely motion to modify or dissolve the injunction. There was an interim of two days between the issuance of the injunction and the Good Friday march. The petitioners give absolutely no explanation of why they did not make some application to the state court during that period. (Slip Op. p. 11)

The critical assumptions contained in this passage did not receive briefing and argument commensurate with their significance as revealed in the court's opinion; they became apparent only upon its publication. Unfortunately, they are mistaken.

This is not a case where state law procedures requiring speedy review of prior restraints of First Amendment rights have been bypassed. Alabama has no such requirements; the circuit court was in no way constrained to rule expeditiously on any motion to dissolve its *ex parte* injunction. Nor was the Supreme Court constrained to rule expeditiously. Until Alabama takes affirmative steps to man-

date prompt determination of such prior restraints, see *Freedman* v. *Maryland*, 380 U. S. 51, then petitioners should not be punished in the name of respect for fictional procedures.

The record does not make unambiguously clear why petitioners "did not make some application to the state court [on April 11, 1963]" (slip op. p. 11). But the record, seen in the context of the history of the time, warrants some general conclusions. In retrospect it appears that a number of factors operated.

First, petitioners would show that they had no reason to believe that a motion to dissolve the injunction, *even if it could have been prepared and filed on April 11*, would have escaped the uncertainty, delay and frustration integral to Alabama procedure. Petitioners have reviewed Alabama cases dealing with appeals from temporary injunctions. They make it apparent that disposition of a motion to dissolve within the Alabama courts would probably have taken at least a matter of months and perhaps longer.[2]

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[2] See *Pennington* v. *Birmingham Baseball Club, Inc.*, 277 Ala. 336, 170 So. 2d 410 (1964) (injunction against picketing a baseball stadium; final adjudication five months later, after the close of the baseball season); *Wilson* v. *State ex rel. Gallion*, 270 Ala. 431, 119 So. 2d 337 (1960) (injunction against money lender preventing the future usurious loans and collection of previous transactions; final adjudication took nine months); *Cochran* v. *State ex rel. Gallion*, 270 Ala. 440, 119 So. 2d 339 (1960) (also an injunction against usurious loans; nine and one-half months until terminal decision); *Wallace* v. *Malone*, 279 Ala. 93, 182 So. 2d 360 (1964) (injunction to prevent cancellation of a textbook contract; four and one-half months from the overruling of the motion to dissolve until reversal of the Circuit Court decision by the Alabama Supreme Court); *Lauderdale County Board of Education* v. *Alexander*, 269 Ala. 79, 110 So. 2d 911 (1959) (injunction against the construction of a bus barn in a residential neighborhood; six months until final adjudication).

The state circuit court was not constrained to rule expeditiously on a motion to dissolve. Nor was the Supreme Court of Alabama constrained to grant expeditious review, although concededly it does have the power to do so pursuant to its Rule 47.[3] But even if Rule 47 were successfully invoked, a trial transcript must be prepared,[4] the appeal must be docketed and time must be taken for preparation of briefs and arguments and consideration by the Supreme Court, none of which are dispensed with by Rule 47. In the most expedited proceedings an indeterminate but lengthy period of time would be consumed during which an invalid temporary restraining order would be suppressing freedom to protest in Alabama.

Of course it may be maintained that petitioners could have put off their marches—perhaps a few days, a few weeks, perhaps even a few months, while petitioners sought relief in the state courts. Such an observation blinds itself to the realities of Birmingham in the Spring of 1963. No purpose would be served in rehearsing that history here. Suffice it to say that the oppressiveness of Birmingham officialdom revealed by these events sparked national sentiment for comprehensive civil rights legislation. "We cannot as judges be ignorant of that which is common knowledge to all men" (Mr. Justice Frankfurter in *Sherrer* v. *Sherrer*, 334 U. S. 343, 366 (1948)).

Second, petitioners' unvaried contacts with Alabama justice offered absolutely no prospect that meaningful relief

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[3] Following decision in the trial court, counsel may on three days' notice petition the court to reduce the time for filing briefs and submitting the appeal.

[4] It may be assumed that the transcript would be of approximately the same length as the voluminous record in the instant case.

would have been granted. Certainly, one of petitioners' representatives (R. 352) had been denied a permit a short time before the event in question. There was an effort to prove—which was denied—that petitioners were remitted to a procedure for securing a permit that all other citizens were not required to follow.

It is common knowledge, and the U. S. Commission on Civil Rights has recorded that:

> . . . While police action in each arrest may not have been improper, the total pattern of official action, as indicated by the public statements of city officials, was to maintain segregation and to suppress protests. The police followed that policy and they were usually supported by local prosecutors and courts. (1963 Report of the U. S. Commission on Civil Rights, Govt. Printing Office, 1963, p. 112.)

Indeed, in this very cause, attempts to obtain permits to parade were rebuffed, we submit, unconstitutionally.[5]

Moreover *NAACP* v. *Alabama,* 357 U. S. 449, 360 U. S. 240, 377 U. S. 288, *Shuttlesworth* v. *Birmingham,* 368 U. S. 959, 373 U. S. 262, 376 U. S. 339, 382 U. S. 87,[6] and *Gober* v. *City of Birmingham,* 373 U. S. 374, hardly inspired confidence that normal functioning of Alabama justice would have been accelerated in order to grant these petitioners their constitutional right to protest against state enforced racism. On the contrary the opposite should rightly have been expected.

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[5] The majority opinion noted that Miss Hendricks, who requested and was denied a permit, was not a petitioner. But she was acting on the petitioners' behalf (R. 352-53).

[6] See also *In re Shuttlesworth,* 369 U. S. 35.

Third, at the time in Birmingham, there were exceedingly few lawyers representing civil rights defendants.[7] There were hundreds of illegal arrests; these few counsel were deeply involved in judicial hearings and securing release of prisoners on bail. Opportunity for detached contemplation and for legal research were at a minimum. These physical factors, compounded by the ambiguity of the legal posture of the situation and the fact that the injunction and underlying ordinance were apparently unconstitutional, probably all contributed in varying degrees to the decision against cancelling the Good Friday and Easter Sunday marches. But when events move quickly and large numbers of people are involved, the basis of decision often is not articulated, and it would be impossible to assemble a catalogue of reasons why the solution evolved as it did. It may be observed, however, that this type of uncertainty may recur in free speech situations involving suddenly-issued temporary restraining orders, and that the rule of this case means "When in doubt, refrain from exerising First Amendment rights." But we submit that the uniform rule of the decisions of this Court dealing with the vagueness doctrine and prior restraints has heretofore been to the contrary.

III.

The demonstrations of 1963 are over and, in a fundamental sense, the demonstrators have been vindicated by the nation through passage of the Civil Rights Act of 1964.

Sentences of 5 days are not intolerable, and, were the consequences of this Court's decision for the nation and

[7] See, 1963 Report, United States Commission on Civil Rights, pp. 117-119; and see, Report of the Twentieth Century Fund, Administration of Justice in the South, pp. 2-6, 1967.

its democratic process not so mischievous, petitioners would have little cause for complaint. But the damage done to First Amendment rights, should this decision stand, will be incalculable. If a vague and overbroad statute need not be obeyed because of its chilling effect upon free speech, how much more chilling is a vague injunction incorporating that statute issued without notice under cover of night? A statute can at least be contemplated in advance; counsel can maturely assess its validity and give appropriate advice. But this course was not possible here.

Petitioners hazarded their liberty on the belief—correctly, we submit—that the injunction was offensive to the First Amendment. Had they been wrong, they would have no complaint. But they were right; and yet this Court says that they must be punished. Petitioners must be punished, the Court says, because the effective modes of legal redress in Alabama must be respected. But, as has been shown, prompt and effective legal procedures in Alabama to curb prior restraints on First Amendment rights are not evident. At a minimum, the cause should be remanded for a thorough canvass of Alabama law and practice to test the validity of this assumption.

The Court's decision leaves the law of prior restraints in a shambles. Even unconstitutionally vague statutes have never been so vague as to require that would-be speakers appraise the speed by which state courts can act. How do counsel learn of a court's workload, or the state of a judge's health, or the difficulty he may have in deciding issues of difficulty? How does another court pass on whether a case moved as quickly as possible? Should counsel now advise those under *ex parte* temporary restraining orders that are incompatible with the First Amendment that they must nonetheless yield to those unconstitutional restraints while

a state court or courts take 10 days, or 20 days, or 90 days or more to determine the matter? Is appeal to a single appellate court enough? Must counsel advise his client to obey the unconstitutional prior restraint while he seeks review in an intermediate appellate court, the state supreme court or, indeed, in this Court? Until now, the answer was plain: If effective and prompt review is not mandated under state law, then prior restraints trenching on First Amendment rights need not be obeyed. *Freedman v. Maryland, supra.*

Moreover, the majority opinion reveals a misunderstanding of petitioners' position—which apparently they expressed unclearly. This misunderstanding markedly affected the court's decision (Slip Op. p. 7):

> We are asked to say that the Constitution compelled Alabama to allow the petitioners to violate this injunction, to organize and engage in these mass street parades and demonstrations, without any previous effort on their part to have the injunction dissolved or modified, or any attempt to secure a parade permit in accordance with its terms.

Nowhere is this misunderstanding more evident than in the majority opinion's concluding paragraph, which refutes an argument never made by petitioners (Slip Op. p. 13):

> [N]o man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics or religion.

Petitioners flatly deny that they sought to be judges in their own case. They sought only to have their case judged according to standards compatible with the First Amend-

ment. They sought only the same rights they clearly would have had if they had been prosecuted under the Birmingham parade permit ordinance rather than under the injunction which incorporated it. While it is difficult to tell the extent to which these misapprehensions influenced the majority's conclusions, further briefing and argument would place beyond dispute what petitioners' contentions actually are.

Rehearing is granted rarely, and never lightly. But the implications of this decision are so dangerous to First Amendment freedoms that it deserves reconsideration.[8] For those concerned with law and order, as well as equal justice and social progress, this is the worst of all possible decisions. The peaceful protest movement—no matter how dissonant it may have become—has channeled dissatisfaction with deeply ingrained injustices into constructive social change. In the face of boiling resentment against long-standing injustices and ugly traditions of oppression, the peaceful protest movement has achieved not only some measure of equal justice and social progress, but has con-

[8] For example, by the device of an *ex parte* injunction that incorporates an unconstitutional statute, a state can now suppress for an indefinite period the distribution of handbills by adherents to a cause that it finds distasteful, see, *Staub* v. *Baxley*, 355 U. S. 313, and can prevent the peaceful and orderly use of a park or other public gathering place by an unpopular religious group, see, *Niemotko* v. *Maryland*, 340 U. S. 268; *Kunz* v. *New York*, 340 U. S. 290. On the eve of an election, city officials can suppress the publication of a newspaper which they know is hostile to their candidacy, see, *Mills* v. *Alabama*, 384 U. S. 214. A public meeting to be addressed by persons whose views state or city officials fear can be stopped, see, *Terminiello* v. *Chicago*, 337 U. S. 1. "Freedom Rides" can be halted, see, *Abernathy* v. *Alabama*, 380 U. S. 447; *Thomas* v. *Mississippi*, 380 U. S. 524, as can, under the very injunction issued herein (R. 32, 38), "sit-ins", even though a city ordinance requires segregation in restaurants, see, *Gober* v. *Birmingham*, 373 U. S. 374.

tributed to stability. By this decision the Court devastates the peaceful protest movement and leaves the field to capture by those violent elements who do not stop to read injunctions.

CONCLUSION

For the foregoing reasons, petitioners request that the Court grant rehearing and reverse the judgment below.

Respectfully submitted,

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